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State of Connecticut

March 23, 2010

The Honorable Donald E. Williams, Jr., Senate President Pro Tempore
The Honorable Martin M. Looney, Senate Majority Leader
Senate Democrats
State Capitol
Hartford, Connecticut 06106-1591

Dear Senators Williams and Looney:

Your March 12, 2010, letter requests an opinion on the constitutionality of a provision of a pending legislative package focusing on job retention and job creation. The proposed legislation consists of a number of related components. You state that concerns have been raised regarding whether one component of that package -- a proposed tax on bonuses related to the Troubled Assets Relief Program ("TARP") -- might be considered an unconstitutional bill of attainder or an ex post facto law. You ask whether the proposed legislation comports with the Connecticut and United States Constitutions. In my opinion, a court would likely find the proposed tax on TARP bonuses to be a constitutional exercise of the State's taxing power.

The first component of the proposed legislative package provides for a two-year suspension of the business entity tax for small businesses that have at least one employee and fifty thousand dollars or less in reportable income for purposes of the tax. To fund this small business incentive, the second component of the legislation proposes a tax on recipients of bonuses in excess of one million dollars from entities that received funds from the federal TARP program on or after December 31, 2007. This TARP bonus tax would apply to each of the taxable years commencing January 1, 2010 and January 1, 2011. The rate of the tax on such bonuses would be 8.97%, and such bonuses would not be subject to the income tax under Connecticut General Statutes § 12-700 et seq. (ranging from approximately 3%-5% depending on filing status).[1]

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[1] According to the Wall Street Journal, twenty-two companies in New York and six companies in Connecticut received TARP funds. Wall Street Journal, *Participants in Government Investment Plan,* April 22, 2009 (available at http://online.wsj.com/public/resources/documents/st_BANKMONEY_200810

The legislative purpose of the proposed tax is to raise revenues that will assist small businesses and promote job growth in these difficult economic times -- a legitimate and reasonable State objective. The relatively low level of the TARP tax will accomplish that purpose in a nonpunitive manner. With a full and clear legislative expression of this legitimate State purpose, a court is likely to determine that the proposed TARP tax is neither a bill of attainder nor an ex post facto law. The opinion takes no position on the policy or merits of whether the legislature should enact the proposed tax.

Bill of Attainder

Article I, Section 10 of the United States Constitution prohibits states from passing any bill of attainder.[2] A bill of attainder is "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 468 (1977).

The determination of whether a challenged legislative proposal constitutes a bill of attainder depends on the individual facts and the manner that various individuals and entities are affected by the law at issue. "[T]hough the governing criterion may be readily stated, each case has turned on its own highly particularized context." *Flemming v. Nestor*, 363 U.S. 603, 616 (1960). Bill of attainder cases are highly fact specific and dependent, making an unqualified response difficult, but relevant case law does provide some useful guideposts.

A bill of attainder generally has three components: (1) specification of the affected persons, (2) punishment, and (3) lack of a judicial trial. *See Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841, 847 (1984). The specificity requirement is met when individuals are identified by name or are defined by past conduct that is irreversible. *Selective Service System, 468 U.S.* at 851. For example, in *United States v. Brown*, 381 U.S. 437 (1965), the Supreme Court found that a law that made it a crime for a member of the Communist Party to serve as an officer of a labor union was void as a bill of attainder. In finding that Congress exceeded its authority, the Court stated that the law did not provide a generally applicable rule decreeing that any person who commits certain acts or possesses certain characteristics shall not hold union

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27.html). It is not clear how many Connecticut taxpayers would be affected by the proposed legislation.

[2] The Connecticut Constitution has no similar provision.

office, but instead, designated in no uncertain terms the persons who possess the specified characteristics. *Id.* at 450.

In *Nixon v. Administrator of Gen. Servs.*, *supra*, former President Richard Nixon challenged the constitutionality of an act that provided for the Administrator of General Services to take custody of his papers and tape recordings. Nixon argued that the act was a bill of attainder because it singled him out for disfavored treatment. The Supreme Court held that Nixon's characterization of the meaning of a bill of attainder was too broad, and that "[h]is view would cripple the very process of legislating, for any individual or group that is made the subject of adverse legislation can complain that the lawmakers could and should have defined the relevant affected class at a greater level of generality." *Id.* at 470. The Court held that the act, which specifically named President Nixon, did not automatically offend the bill of attainder clause, especially when viewed in context of the entire act and its purpose. *Id.* at 472.

Thus, while legislation singling out an identifiable group for some adverse treatment implicates concerns regarding the prohibition on bills of attainder, such legislation does not automatically run afoul of the Constitutional proscription. Other factors must also be considered. For example, in *Hogan v. Dept. of Children & Families*, 290 Conn. 545, 964 A.2d 1213 (2009), the Connecticut Supreme Court concluded that even if legislation met the first and third components (specifying the affected persons and no judicial trial) of a bill of attainder, the second component (punishment) would also have to be met for the statute to constitute a bill of attainder.

In this case, the taxation of TARP bonuses seems unlikely to be considered a punishment. "States have considerable latitude in imposing general revenue taxes," *Commonwealth Edison Co. v. Montana,* 453 U.S. 609, 622 (1981). A court would lack persuasive grounds to consider the proposed tax as "so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but constitutes, in substance and effect, the direct exertion of a different and forbidden power, as, for example, the confiscation of property," *Pittsburgh v. Alco Parking Corp.*, 417 U.S. 369, 375 (1974) (internal citation and quotation marks omitted). Here, the legislative purpose of the tax is stated to be raising revenues to replace the revenues lost from the suspension of the business entity tax for small businesses. Thus, on its face, the proposed legislation does not appear to be a "punishment" under a functional test.

The circumstances surrounding the enactment of this proposed legislation would also be very important in a court's determination of whether the legislation

furthers nonpunitive goals. In making that determination, a court would "inquire into the existence of less burdensome alternatives by which [the] legislature could have achieved its legitimate nonpunitive objectives." *Consolidated Edison of N.Y. v. Pataki*, 292 F.3d 338, 351 (2d Cir. 2002), *cert. denied,* 537 U.S. 1045 (2002) (internal citation and quotation marks omitted.). For example, the *Consolidated Edison of N.Y.* case involved a New York statute that prohibited Consolidated Edison from passing on to its customers the costs relating to a power outage at a nuclear plant that was caused by Consolidated Edison's negligent failure to replace generators it knew were faulty. In finding that this law was a bill of attainder, the Court of Appeals noted that because Consolidated Edison could have passed on to its customers the costs of a scheduled outage to replace the generators, the prohibition in the statute could only be viewed as a punishment for Consolidated Edison's negligence. *Id.* at 353-54.

Similarly, in *Acorn v. United States,* 662 F. Supp. 2d 285 (E.D.N.Y 2009), the Association of Community Organizations for Reform Now, Inc. ("ACORN") challenged as an unconstitutional bill of attainder a continuing appropriations resolution enacted by Congress that prohibited ACORN from receiving any federal funds. The district court found this law to be unconstitutional under the bill of attainder clause. Prior to the enactment of the appropriations resolution, there were numerous allegations of misconduct by ACORN employees, including violations of tax laws involving non-profit organizations, misused taxpayer dollars, and voter fraud. Even though the government argued that the bar on all funding to ACORN was not punitive, the district court stated that "the nature of the bar and the context within which it occurred make it unmistakable that Congress determined ACORN's guilt before defunding it." *Id.* at 294. The court also noted that there was no explanation why ACORN was treated differently from other contractors. *Id.* at 295.

In this matter, the question of why the tax applies only to TARP bonuses, and not all bonuses that exceed one million dollars, might be considered by a court and could call into question whether the tax had a nonpunitive objective. On the other hand, the State's large and ongoing fiscal crisis, the relatively low level of the proposed tax, and the legislature's stated desire to promote small business and job growth would weigh in favor of finding just such a nonpunitive objective.

Finally, whether the proposed legislation has punitive motives depends in part on a legislative record that does not yet exist. A "legislative record by itself is insufficient evidence for classifying a statute as a bill of attainder unless the record reflects overwhelmingly a clear legislative intent to punish." *Consolidated*

Edison of N.Y. v. Pataki, supra at 354. Thus, if the legislative record does not show a clear legislative intent to punish, it is unlikely that this tax would be found to be a bill of attainder. To the extent the legislative record highlights the General Assembly's desire to close the budget deficit and to promote small business and job growth, these facts should weigh against a finding of any improper motive in passing the tax.

Ex Post Facto

The U.S. Supreme Court has repeatedly upheld retroactive tax legislation against constitutional challenges. *See e.g., United States v. Darusmont*, 449 U.S. 292 (1981). There is no constitutional violation simply because the proposed legislation imposes taxes on income already earned or received.

Article 1, Section 10 of the Constitution provides that no state shall pass any ex post facto law.[3] This constitutional provision forbids legislation which imposes or increases criminal punishment for conduct lawful previous to its enactment. *Harisiades v. Shaughnessy*, 342 U.S. 580, 594 (1952).

In *Smith v. Doe,* 538 U.S. 84 (2003), the Supreme Court stated that the inquiry into determining whether a law constitutes criminal punishment that is prohibited by the ex post facto clause is well established.

> We must "ascertain whether the legislature meant the statute to establish 'civil' proceedings." *Kansas v. Hendricks*, 521 U.S. 346, 361, 138 L. Ed. 2d 501, 117 S. Ct. 2072 (1997). If the intention of the legislature was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, we must further examine whether the statutory scheme is "'so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.'" *Ibid.* (quoting *United States* v. *Ward*, 448 U.S. 242, 248-249, 65 L. Ed. 2d 742, 100 S. Ct. 2636 (1980)). Because we "ordinarily defer to the legislature's stated intent," *Hendricks*, *supra*, at 361, "'only the clearest proof ' will suffice to override legislative

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[3] The Connecticut Constitution has no similar provision.

> intent and transform what has been denominated a civil remedy into a criminal penalty," *Hudson* v. *United States*, 522 U.S. 93, 100, 139 L. Ed. 2d 450, 118 S. Ct. 488 (1997) (quoting *Ward*, *supra*, at 249); see also *Hendricks*, *supra*, at 361; *United States* v. *Ursery*, 518 U.S. 267, 290, 135 L. Ed. 2d 549, 116 S. Ct. 2135 (1996); *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354, 365, 79 L. Ed. 2d 361, 104 S. Ct. 1099 (1984).

Id. at 92.

A court would not likely view the proposed tax as so punitive in purpose and effect as to deem it a criminal punishment. The tax rate is not so high that it would appear to be punitive. If the legislature's stated intent is given deference, the tax cannot be seen as a criminal penalty.

Conclusion

In summary, the proposed tax does not appear to be a bill of attainder or an ex post facto law. This area of law is not often litigated and a court's final determination will depend on the circumstances surrounding the enactment. If the circumstances surrounding passage show that the proposed legislation furthers a legitimate, nonpunitive legislative goal, the proposed legislation is likely to survive constitutional scrutiny.

Very truly yours,

RICHARD BLUMENTHAL
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